Supreme Court, U.S.
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NO. 93-109

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

GILBERT R. SERRANO
Petitioner

V.

UNITED STATES OF AMERICA
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

WALTER SHARE
7414 ORIN COURT N.
SEATTLE, WA 98103
(206) 522-2020

ATTORNEY OF RECORD
FOR PETITIONER SERRANO

ALSO ON THE BRIEF:
JEFFREY M. FELDMAN
YOUNG SANDERS AND FELDMAN
500 L STREET, SUITE 400
ANCHORAGE, AK 99501
(907) 272-3538

BEST AVAILABLE COPY

QUESTION PRESENTED IN REPLY

Does the Ninth Circuit pattern jury instruction, which defines reasonable doubt as "firmly convinced," dilute reasonable doubt to a mere civil standard and conflict with the instructions used in the Eighth, Eleventh, Second, and Third Circuits, which require the "hesitate to act" definition of *Holland*, and with *Cage v. Louisiana* and *Sullivan v. Louisiana*, which condemn similar definitions?"

TABLE OF CONTENTS

ISSUE PRESENTED IN REPLY i

TABLE OF CONTENTS ii

TABLES OF AUTHORITIES iii

1. "FIRMLY CONVINCED" IS A CIVIL STANDARD THAT CONFLICTS WITH *HOLLAND, CAGE* AND *SULLIVAN* 1

2. THE NINTH CIRCUIT DEFINITION OF REASONABLE DOUBT CONFLICTS WITH OTHER CIRCUITS 4

3. CONCLUSION 8

TABLE OF AUTHORITIES

Addington v. Texas, 441 U.S. 418, 99 S. Ct 1804, 60 L.Ed 2d 323 (1979). . 1

Cage v. Louisiana, 489 U.S. 39,111 S.Ct. 328, 112 L.Ed 2d 339 (1990) . . . 2

Fred Walker Agency v. Lucas, 211 S.E.2d 88 (Va.1975) 1

Holland v. U.S., 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed 150 (1954) 1

Sullivan v. Louisiana, __ U.S.__ (#92-5129, 6/1/93, 1993) 2

U.S. v. Jensen, 561 F.2d 1297 (8th Cir. 1977) 4

United States v Barrera-Gonzales 952 F. 2d 1269 (10th Cir. 1992) 6

United States v. Daniels, 986 F.2d 451 (11th Cir. 1993) 5

United States v. Delibac, 925 F.2d 610 (2d Cir. 1991) 5

United States v. Gibson, 726 F. 2d 869 (1st Cir. 1984) 7

United States v. Hunt, 794 F. 2d 1095 (5th Cir. 1986) 7

United States v. Mcbride, 786 F.2d 45 (2d Cir.1986) 5

United States v. Porter, 821 F. 2d 968 (4th Cir. 1987) 6

United States v. Restaino, 369 F.2d 544 (3rd. Cir.1975) 6

United States v. Taylor, 997 F. 2d 1551 (D.C.Cir. 1993). 7

United States v, Wright, 365 F,2d 1297 (7th Cir. 1966). 6

1. "FIRMLY CONVINCED" IS A CIVIL STANDARD THAT CONFLICTS WITH *HOLLAND, CAGE* AND *SULLIVAN*.

The government argues that this Court has never required a "hesitate to act" definition or condemned a "firmly convinced" definition of reasonable doubt. However, this Court has held that the term "convincing" is a mere civil standard and recently has condemned language almost identical to "firmly convinced."

In *Addington v. Texas*, 441 U.S. 418, 423-24, 99 S. Ct 1804, 1808, 60 L.Ed 2d 323 (1979), this Court held that the civil standard of "clear and convincing evidence" includes evidence which is "cogent" "unequivocal" or "*convincing*." The civil clear and convincing standard is defined as "a firm belief or conviction." *Fred Walker Agency v. Lucas,* 211 S.E.2d 88, 92 (Va.1975) The "firmly convinced" standard is thus identical to this *civil* standard.

In *Holland v. U.S.*, 348 U.S. 121, 75

S.Ct. 127, 99 L.Ed 150 (1954), this Court condemned the term "serious affairs" since reasonable doubt involves more certainty than "buying a house or choosing a spouse." Yet anybody who buys a house or proposes marriage is normally "firmly convinced." The firmly convinced standard is no higher than the "serious affairs" standard condemned in *Holland*.

In *Cage v. Louisiana*, 489 U.S. 39, 111 S.Ct. 328, 112 L.Ed 2d 339 (1990) and *Sullivan v. Louisiana*, __ U.S.__ (#92-5129, 6/1/93), this Court condemned defining reasonable doubt as "substantial" or "grave." The term "firmly convinced" is no different than the terms "substantial" and "grave" condemned in *Cage* and *Sullivan*./[1]

Nor does the government state how "firmly" rises above a mere preponderance.

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1 The government also fails to distinguish the many cases that have condemned similar terms like "abiding conviction," "well founded," "substantial," "strong," "serious," or "fair doubt." *See* Opening Petition pages 13-15.

Jurors could easily believe "firmly" means believing guilt is "more likely than not," to a degree of only 51%, and does not require jurors to extinguish significant doubts. One might be "firmly convinced" to vote for a presidential candidate despite serious hesitations as to all. One might be firmly convinced to buy a Chevy instead of a Ford but have major doubts as to both. Surveys show jurors estimate a reasonable doubt to be as low as 50%. /[2]

No person should suffer jail or the death penalty based on a civil standard of reasonable doubt. "Firmly convinced" is exactly the type of definition found to be a civil standard in *Addington* and condemned in *Holland, Cage and Sullivan* and offends the very essence of due process.

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2 McCauliff, *Burdens of Proof Degrees of Belief, Quanta of Evidence or Constitutional Guaranties?* 35 Vanderbuilt L. Rev. 1293, 1325 (1982(Tab.2); *See also* David Strawn & Raymond Buchanan, *Jury Confusion: A Threat to Justice*, 59 Judicature 478, 481-82 (May 1976).

2. THE NINTH CIRCUIT DEFINITION OF REASONABLE DOUBT CONFLICTS WITH OTHER CIRCUITS.

The government argues there is no conflict in the circuits. This is false. The Eighth, Second, and Eleventh Circuits all require the "hesitate to act" instruction of *Holland*. The Second, Fourth, and Tenth Circuits have criticized use of the "firmly convinced" standard.

The Eighth Circuit adopted the "hesitate to act" definition in *U.S. v. Jensen*, 561 F.2d 1297 (8th Cir. 1977) and held that defining reasonable doubt in terms of an "abiding conviction" improperly diluted reasonable doubt to a preponderance standard, contrary to *Holland, supra;*

> The instruction is confusing because it makes reasonable doubt contingent upon whether one is "satisfied of the defendant's guilt" and whether one has "an abiding conviction of guilt." *Use of these phrases approaches a reasonable man criterion rather than the strict standard envisioned as "beyond a reasonable doubt."*

Id. at 1301. (emphasis added) The term "abiding conviction" condemned by the Eighth Circuit is indistinguishable from the "firmly convinced" standard.

The Second Circuit in *United States v. Mcbride,* 786 F.2d 45, 51 (2d Cir. 1986), cautioned against a "firmly convinced" standard noting this would confuse juries and stated its preference for the "hesitate to act" definition. In *United States v. Delibac,* 925 F.2d 610 (2d Cir. 1991), the Second Circuit more recently repeated it's earlier warning that the "hesitate to act" language of *Holland,* must be included in reasonable doubt definitions. *Id.* at 614.

The Eleventh Circuit recently re-affirmed its "hesitate to act" pattern instruction in *United States v. Daniels,* 986 F.2d 451 (11th Cir. 1993) stating its disapproval of a "substantial doubt" standard and preference for the "hesitate to act" standard. *Id.* at 456-458.

The Fourth Circuit holds that no definition need be given unless requested by the jury, but recently condemned "firmly convinced" stating its preference for the "hesitate to act" definition if one is given. *United States v. Porter*, 821 F.2d 968 (4th Cir. 1987), *cert. denied*, 485 U.S. 934, 108 S.Ct. 1108 (1988).

Contrary to the government's contention, the Tenth Circuit has not adopted a "firmly convinced" standard. In *United States v Barrera-Gonzales*, 952 F.2d 1269 (10th Cir. 1992) (cited by the government) the Tenth Circuit recently found "firmly convinced" was not "plain error" in absence of objection, but re-affirmed its strong preference for the "hesitate to act" definition of *Holland*.

The Third Circuit also urges use of the "hesitate to act" definition. *United States v. Restaino*, 369 F.2d 544 (3rd. Cir. 1975).

By contrast, the government argues that the D.C., First, Fifth, and Ninth Circuits have upheld "firmly convinced" instructions./[3] The government's cases illustrate that there is a serious and growing split in the circuits on this vital instruction./[4]

Thus, contrary to the government's argument, the Eighth, Second, Third, and Eleventh Circuits require the "hesitate to

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3 The government cites *United States v. Taylor*, 997 F. 2d 1551 (D.C.Cir. 1993); *United States v. Gibson*, 726 F. 2d 869 (1st Cir. 1984), *cert denied*, 466 U.S. 934, 108 S.Ct. 2174, 80 L.Ed 2d 557 (1984); *United States v. Hunt*, 794 F. 2d 1095 (5th Cir. 1986).

4 The D.C. and Tenth Circuit instructions in *United States v. Taylor, supra*, and *United States Barrera-Gonzales, supra*, unlike the Ninth Circuit pattern state that "firmly convinced" requires more than a preponderance, as follows;

> Some of you have served as jurors in civil cases where you were told it was only necessary to prove a fact is more likely true than not true. We call that the preponderance of the evidence. In criminal cases the government's proof must be more powerful than that; it must be beyond a reasonable doubt.

By contrast, the Ninth Circuit pattern given never explained that "firmly" means more than a preponderance.

act" definition of *Holland*. The Second and Fourth Circuits, have criticized "firmly convinced," and the Tenth and Third Circuits have stated their preference for the "hesitate to act" standard. These Circuits are in conflict with the D.C., First, Fifth, and Ninth Circuit's "firmly convinced" standard.

It is astonishing to think that something as vital as the definition of reasonable doubt can vary from Circuit to Circuit. Federal due process should be the same in Alaska as it is in New York. It cannot be said there is "equal justice for all" when in some Circuits defendants are given a "hesitate to act" standard of reasonable doubt, while in other circuits defendants are given a diluted civil standard such as "firmly convinced" or no definition at all.

3. CONCLUSION

The Ninth Circuit's pattern definition of reasonable doubt as "firmly convinced," is a mere civil standard, under *Addington* and is contrary to *Holland, Cage and Sullivan,* which condemn virtually identical terms such as "serious affairs," "substantial" and "grave."

The "firmly convinced" standard conflicts with the Eighth, Second, Third, and Eleventh Circuits, which require the "hesitate to act" definition of *Holland,* and the Fourth and Tenth Circuits, which have criticized a "firmly convinced" standard.

No person should suffer jail or the death penalty based on a civil standard of reasonable doubt. Nor is there equal justice for all so long as those in some circuits are given a "hesitate to act" standard of reasonable doubt, while those in conflicting circuits get a mere civil

standard of "firmly convinced."

This Court should grant this writ or summarily reverse the Ninth Circuit's use of a pattern instruction that so violently conflicts with *Holland, Cage, and Sullivan*.

Respectfully submitted this 27th day of September, 1993.

FOR: WALTER SHARE
7414 ORIN COURT NORTH
SEATTLE, WASHINGTON 98103
(206) 522-2020

ATTORNEY OF RECORD
FOR PETITIONER SERRANO

ALSO ON THE BRIEF:
JEFFREY M. FELDMAN
YOUNG SANDERS AND FELDMAN
500 L STREET, SUITE 400
ANCHORAGE, ALASKA 99501
(907) 272-3538